Victorian Council for Civil Liberties Inc
Reg No: A0026497L

GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au



libertyvictoria.org.au

28 April 2017

Acting Independent National Security Legislation Monitor
Dr James Renwick SC
One National Circuit
Barton ACT

Submitted online at https://www.inslm.gov.au/submissions/online-submissions

**Re: INSLM Statutory Deadline Reviews**

1. Liberty Victoria is grateful for the opportunity to make this submission to the Independent National Security Legislation Monitor's (**INSLM**) Statutory Deadline Review of:
    a. Division 3A of Part IAA of the *Crimes Act 1914* (Cth) (**Crimes Act**) (Stop and Seize powers);
    b. Sections 119.2 and 119.3 of the *Criminal Code 1995* (Cth) (**Criminal Code**) (Declared areas); and
    c. Division 104 and 105 of the Criminal Code (Control Orders and Preventive Detention Orders), including the interoperability of the control order regime and the *High Risk Terrorist Offenders Act 2016* (Cth).
2. Liberty Victoria acknowledges the important and difficult role that law enforcement agencies play in keeping Australia safe. These agencies must have appropriate powers to combat the persistent threat of violent extremism. But we must also fiercely protect the fundamental rights and freedoms that are constitutive of life in Australian society. Maintenance of this way of life depends on carefully scrutinising any proposed expansion

of law enforcement powers, to ensure that they strike the right balance between security and fundamental rights and freedoms.

3. Meaningful reviews are required to ensure that counter-terrorism laws are necessary and effective in the prevention or response to any terrorist threat. Such laws must remain just and proportionate having regard to the competing and compelling public interest in the protection of fundamental rights and freedoms.

4. In this context, we highlight the recent comments of Justice Harper in *Chief Examiner v Brown* in which he warned regarding the normalisation of exceptional policing powers.

> Power … tends to corrupt. Not necessarily – or even most often – by direct involvement in corruption of the criminal kind, but also by something much more subtle. Lord Acton's epigram has echoed down the ages because he spoke of power's tendency to corrupt before adding 'and absolute power corrupts absolutely'…
>
> Such officials may have an acute appreciation of the valid reasons why power has been conferred upon them. A similarly acute appreciation of the proper limits of that power is not so easily grasped, because the prospect and actuality of the exercise of power itself tends to dull the imaginative appreciation of its true purpose, and of the effects of its misuse or misapplication. We are too easily duped into an overweening sense of the importance of who we are and what we do.[1]

5. We note that we have made the following previous submissions on these and related issues:

    a. Submission to the Senate Legal and Constitutional Legislation Committee, Inquiry into the provisions of the Anti-Terrorism (No 2) Bill 2005, dated 11 November 2005: https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-submission-Parliamentary-Inquiry-into-the-provisions-of-the-Anti-Terrorism-no2-Bill2005-20051123-sub221.pdf; and

    b. Submission to the Independent National Security Legislation Monitor (with the Councils for Civil Liberties), Review of certain questioning and detention powers in relation to terrorism, dated 15 August 2016: https://libertyvictoria.org.au/sites/default/files/Councils-for-Civil-Liberties-submission-Questioning-and-detention-INSLMreview20160815web.pdf.

6. This submission will address only the first and third areas of review. Consistent with our previously stated position, Liberty Victoria maintains its concern in relation to the content of Stop and Seize powers and the regime for Control Orders and Preventive Detention Orders.

[1] [2013] VSCA 167, [2]-[3].

**1. STOP AND SEIZE POWERS**

General comment

7. Liberty Victoria maintains its serious concerns about the need for the 'stop, seize powers'. In our submission to the Parliamentary Inquiry into the provisions of the Anti-Terrorism (No.2) Bill 2005, dated 11 November 2005, we pointed out that the granting of arbitrary and random stop and search powers in the absence of controls akin to those contained in a Bill of Rights was very concerning, since the potential for abuse in the interests of political expediency was self-evident.
8. Liberty further argues that the grant and subsequent exercise of such extraordinary stop and search powers requires a system of comprehensive independent auditing of the use of the powers. This is particularly so given there is, in Australia, no Bill of Rights to provide a constitutional or legislative framework in relation to which the appropriateness of the grant and exercise of invasive counter-terrorism powers can be judged. Even where a Bill of Rights is in force, the need for regular independent random auditing of the exercise of the powers those presently under consideration is necessary to maximise the protection of the public from abuse of power by executive government. In the present tense environment, the risk of such abuse is all too real.
9. It follows that Liberty, as it has done since its foundation in the 1930s, calls for the enactment of a Federal Charter or Bill of Rights as a counterweight to executive excess, not least in the arena of counter-terrorism law.

Main concerns regarding Division 3A, subdivision B – Powers

10. Liberty Victoria's maintains its concerns, which can be summarised as follows:
    a. Whether additional search and seizure powers are necessary given the scope and nature of police powers in Division 3A *Crimes Act 1914* (Cth*);*
    b. the sweeping nature of the powers;
    c. the likely (and/or continuing) impact of the powers on specific racial and religious groups; for example the Muslim community;
    d. the extraordinary nature of the Minister's discretionary power to declare an area a 'prescribed security zone';
    e. the existing power to seize items related to serious offences (not terrorism offences);
    f. the need for and inadequacy of independent oversight of the use of the powers.
11. We will address some of the main concerns in detail below.

Section 3UD – stop and search

12. There are four key concerns with the stop, search and seize powers:
    a. the standard of proof – s 3UB(1)(a);
    b. the lack of a standard of proof to stop, search and seize in a 'prescribed security zone';
    c. the types of searches authorized;
    d. the grounds needed for a declaration of a 'prescribed security zone'; and
    e. the duration of the declaration.

**The power to stop and search**

13. The power to stop, search and seize under s 3UD can be exercised in two ways, depending on location, as location dictates the basis of the exercise of power.
14. First, if a person is in a 'prescribed security zone', then the police (state, territory or federal) can freely exercise the power to stop, search and seize.
15. Secondly, if a person is in a Commonwealth place, such as a post office, airport or election booth, an officer only has to hold 'reasonable grounds to suspect' that (s)he might have committed, might be committing or might be about to commit a terrorist act in order to exercise the powers (see section 3UB(1)(a)).
16. Liberty Victoria is concerned about how easy it is for the Minister to declare a 'prescribed security zone', the uncurtailed power of police to stop and search once in a prescribed security zone, and the very low standard of proof required when a person is in a Commonwealth place.

**'Prescribed security zone' – arbitrary**

17. The arbitrary nature of the Minister's ability to declare a 'prescribed security zone' is troubling in two ways:
    a. It is too broad a power as the power to declare is triggered by a low threshold – i.e. 'to assist in preventing or responding to a terrorism act occurring' (see s 3UJ).
    b. This appears to allow police to stop, search or seize items, almost without limitation as no legislative criteria exist with respect to the power.
18. Further, the standard of proof to stop and search in Commonwealth areas is far too low, and inadequately protects the right to freedom of movement and privacy and as protected in Articles 12 and 17 of the *International Covenant on Civil and Political Rights*, respectively.
19. Indeed once in a 'prescribed security zone', a person's right to privacy and movement is entirely abrogated as police can stop and search freely and randomly.

20. The government has failed to argue persuasively that these powers to stop and search are necessary and proportionate to the objective of ensuring public safety.

**Reasonable suspicions – inadequate standard of proof**

21. Courts have found that the standard of proof of 'reasonable suspicion' is low.
22. It is much lower than reasonable belief – the High Court of Australia in *George v Rockett* (***Rockett***) held that the facts which can reasonably ground a suspicion may be quite insufficient to ground a belief.[2]
23. The Court also endorsed a definition of reasonable suspicion as 'more than a mere idle wondering', but equivalent to 'a positive feeling of actual apprehension or mistrust', amounting to 'a slight opinion but without sufficient evidence'.[3]
24. In *Rockett*, the High Court also cited with approval Lord Devlin's definition of reasonable suspicion in *Hussein v Chong Fook Kam* as a 'state of conjecture or surmise where proof is lacking'.[4]
25. 'Mistrust' or 'slight opinion' as the relevant standard is wholly inadequate to safeguard against police abuse. This is even more so the case in relation to the emergency search and seizure powers – which authorize entry in to a premises without warrant (s 3UE) on the same low standard.
26. Amending the standard of proof to 'reasonable belief' would require objective evidence before the exercise of the power. This standard would still permit extraordinary stop, search, and entry in to premises and seizure (without warrant) if necessary.

***Recommendation 1: Liberty Victoria proposes the following amendments to the Stop and Seize powers in Division 3A of Part IAA of the Crimes Act:***

- ***a. changing to standard of proof in s 3UB to 'reasonable belief';***
- ***b. limiting the types of searches to ordinary or frisk searched in 'prescribed security zones.'***
- ***c. reducing the duration of a declaration of prescribed security zone to 14 days as recommended by the United Nations UN Special Rapporteur in 2006;[5]***
- ***d. including a provision that requires police exercising powers under Division 3A to undergo and maintain adequate training in the use of the stop, search and seize powers; and***

[2] (1990) 170 CLR 104, 115.
[3] (1990) 170 CLR 104, 116.
[4] [1970] AC 942, 984.
[5] See http://www.ohchr.org/EN/Issuses/Terrorism/Pages/Annual.aspx.

*e. including a provision that requires police to collect and maintain data of when, where and why they exercise those powers, for example in a daily electronic patrol diary.*

**Types of searches and use of force**

27. In relation to types of searches and the use of force, Liberty Victoria refers to paragraph 35-38 of its submission dated 11 November 2005 to Senate and Legal Constitutional Legislation Committee in to the Parliamentary Inquiry into the provisions of the Anti-Terrorism (No.2) Bill 2005.

## 2. CONTROL ORDERS AND PREVENTIVE DETENTION ORDERS

28. In our view, the regimes for Control Orders and Preventive Detention Orders under the Criminal Code skew the balance between freedom and security. These powers authorise radical intrusions on personal liberty without the traditional protections of the criminal law. They are unnecessary and unwarranted. They should no longer form part of the arsenal of Australia's counter-terrorism agencies.
29. Liberty Victoria generally endorses the criticisms of Control Orders and Preventive Detention Orders made by the then INSLM, Bret Walker SC, in his Annual Report dated 20 December 2012.[6]

Control Orders

**What are Control Orders?**

30. Division 104 of Part 5.3 of the Criminal Code provides for the making of Control Orders (**COs**).
31. The purpose of a CO is to protect the community from a terrorist attack, by imposing certain obligations and restrictions (short of actual detention) on a particular person.
32. A senior member of the Australian Federal Police (**AFP**) may, with the Attorney-General's consent, request an issuing court to grant an interim CO in relation to a person (the **subject**). The court may only make an interim CO in the following circumstances:
    a. The court must be satisfied, on the balance of probabilities, either that making the order would substantially assist in preventing a terrorist act or the provision of support for or the facilitation of a terrorist act, or that the subject has engaged in conduct related to terrorism or a terrorist organisation.[7]

[6] See INSLM, *Annual Report* (20 December 2012) 6-67 (**2012 Report**).

[7] Specifically, a CO may be if, among other things, the subject has provided training to, received training from or participated in training with a listed terrorist organisation; the subject has engaged in a hostile activity in a foreign country; the subject has been convicted in Australia of an offence relating to terrorism, a terrorist organisation (within the meaning of subsection 102.1(1) of the Criminal Code) or a terrorist act (within the meaning of section 100.1 of the Criminal Code); the subject has been convicted in a foreign country of an offence that is constituted by conduct that, if

b. The court must be satisfied, on the balance of probabilities, that each of the terms of the CO is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act, preventing the provision of support for a terrorist act, or preventing the provision of support for the engagement in a hostile activity in a foreign country.

33. The issuing court must, as soon as practicable, review and confirm, vary or revoke the interim CO. If confirmed, a CO may be in force for up to 12 months.

**Problems with COs**

*Alarming intrusion on personal liberty*

34. As noted by the Parliamentary Joint Committee on Human Rights, a CO involves 'very significant limitations on human rights'.[8]
35. A CO can prohibit a person from being at certain areas or places, require them to remain at home between specified times for up to 12 hours per day, require them to wear a tracking device, prohibit them from communicating with certain people, prohibit them from using certain forms of technology such as telephones or the internet, prohibit them from carrying out certain activities including work, require them to report to certain places at certain times, require them to be photographed or have their fingerprints taken, or require them to participate in specified counselling or education.
36. Breach of a term of a CO is a serious criminal offence, punishable by imprisonment for up to five years.[9]
37. Liberty Victoria opposes COs in principle. A CO trespasses upon the subject's basic rights and freedoms, including personal liberty, freedom of movement, freedom of expression and association, and the right to privacy, in the absence of any charge or conviction for a criminal offence based on past conduct. COs are thus inconsistent with the notions of personal liberty and the rule of law that govern life in a free and democratic society

*Absence of procedural protections of the criminal law*

38. COs are made through a civil procedure which lacks the traditional safeguards of the criminal law. This compounds their radical incursion on personal liberty.
39. The procedural flaws include the following:

---

engaged in in Australia, would constitute a terrorism offence (within the meaning of subsection 3(1) of the Crimes Act); or the subject has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country.

[8] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourteenth Report of the 44th Parliament* (2014) 17.

[9] Criminal Code s 104.27.

a. The AFP need only establish the grounds for a control order on the civil standard of proof (on the balance of probabilities), as opposed to the more stringent criminal standard (beyond reasonable doubt).

b. A CO proceeding lacks the evidentiary protections of the criminal law. This is vividly illustrated by the case of Joseph 'Jack' Thomas. Thomas had been convicted of several terrorism-related offences based on admissions he had made to the AFP in Pakistan. In 2006, the Victorian Court of Appeal quashed Thomas' convictions because his admissions had been obtained involuntarily and were thus inadmissible as evidence.[10] Later that year, however, the AFP sought and obtained a CO in relation to Thomas on the basis of those same, involuntary admissions, because the proceedings were civil and interlocutory.[11]

c. The CO regime does not protect against double jeopardy. A person who has been acquitted of a criminal offence, or who has been convicted and served their sentence of imprisonment, may be subjected to further restraints on their liberty in respect of the same conduct.

d. A CO may be made on the basis of secret evidence, the existence of which is not required to be disclosed to the subject.[12]

40. We echo Andrew Lynch's caution that COs may be used as a form of forum-shopping, in order to avoid the procedural protections of the criminal law.[13]

*Unnecessary*

41. COs are unnecessary. Law enforcement agencies have a number of more conventional tools to address the risk that a person may engage in a terrorist attack.

42. Australia's inchoate or precursor terrorism offences criminalise terrorism-related conduct even at a very early stage of planning or implementation. For instance, section 101.6(1) of the Criminal Code makes it an offence, punishable by life imprisonment, to do 'any act in preparation for, or planning, a terrorist act'.

43. The existence of these offences undermines the rationale for COs. If police have sufficient evidence to establish (for the purposes of obtaining a CO) that the terms of a CO are *reasonably necessary* to protect the public from a terrorist act, then they will almost

[10] *R v Thomas* (2006) 14 VR 475.
[11] *Jabbour v Thomas* (2006) 165 A Crim R 32.
[12] Pursuant to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). See Lisa Burton and George Williams, 'What future for Australia's control order regime?' (2013) 24 *Public Law Review* 182, 199-200.
[13] Andrew Lynch, '*Thomas v Mowbray*: Australia's 'War on Terror' Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182, 1187.

always have a legal basis to arrest and charge the person in accordance with standard criminal procedures.[14]

44. As the INSLM noted in the 2012 Report:

> [T]he required satisfaction that the proposed CO "is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act" is virtually bound in all imaginable circumstances to involve a real apprehension based on available evidence that the respondent is set on a course that, but for the terms of the proposed CO, would result in a terrorist offence being committed by the respondent.
>
> In this manner, the kind and cogency of evidence in support of an application for a CO converges very closely to the kind and cogency of evidence to justify the laying of charges so as to commence a prosecution. In particular, the availability, peculiar to terrorism, of precursor or inchoate offences earlier in the development of violent intentions and actions than ordinary conspiracy offences, renders this convergence practically complete.
>
> This practical possibility of early prosecution, therefore, in accordance with Australia's strong commitment to countering terrorism by the criminal law and its processes, attenuates the policy justification (such as it is) for the non-criminal power to make COs.[15]

45. If police do not have sufficient evidence to arrest and charge a person with an inchoate or precursor terrorism offence, there is no warrant for subjecting the person to the serious intrusions on liberty associated with a CO.

46. Again, as the INSLM noted in the 2012 Report:

> There is no proper need for another route to official restraints on a person's liberty where the case against a person may be arguably considered weak. Authorities can deal with people who fall into this category in the same way they deal with other suspected crimes, including serious crimes like conspiracy to murder or rob banks, by either prosecuting or continuing to investigate until there is sufficient evidence to prosecute. Meanwhile, surveillance may continue where appropriate.
>
> …
>
> We do not say for other serious crimes that because the person may be acquitted we will not try them and instead we will subject them to a CO. This would not be accepted as reasonable or necessary to address other serious crimes and it should not be accepted in relation to terrorism.[16]

47. In Liberty Victoria's view, the risks of violent extremism can be readily addressed by the same law enforcement powers and methods used to detect, prevent and prosecute other criminal behaviour. This is attested to by the fact that there have been merely six interim

[14] Liberty Victoria has serious concerns about the breadth of the terrorism offences under the Criminal Code. However, these concerns lie outside the scope of the present review. For further analysis, see Nicola McGarrity, '"Testing" Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 34 *Criminal Law Journal* 92, 113-4.

[15] INSLM, 2012 Report, 30-1.

[16] INSLM, 2012 Report, 31, 36.

COs issued since the legislation came into force, of which only two were confirmed. There is no need for the CO regime. As the INSLM stated in 2012:

> Instead, the twofold strategy obtaining elsewhere in the social control of crime should govern. First, investigate, arrest, charge, remand in custody or bail, sentence in the event of conviction, with parole conditions as appropriate. Second, and sometimes alternatively, conduct surveillance and other investigation with sufficient resources and vigour to decide whether the evidence justifies arrest and charge. (And, meantime, surveille [sic] as intelligence priorities justify.)[17]

*Ineffective*

48. The CO regime proceeds on the assumption that the terms of a CO will be effective to prevent the subject from engaging in a terrorist act. In 2012, the INSLM commented that the United Kingdom's experience with people breaching COs presented 'a compelling example of the ineffectiveness of COs.'[18] We query whether a person who is in fact committed to conducting a terrorist attack, including possibly by suicide, will be deterred by a court order.[19]

*Frustrate criminal investigations*

49. Experience in the United Kingdom has shown that COs do not help, and may hinder, the ordinary criminal investigative process. The Independent Reviewer of the UK CO scheme, David Anderson QC, found that COs 'were not effective as an aid to the investigation and prosecution of terrorist crime' and 'did not prove a useful source of evidence for criminal prosecutions'.[20] More importantly, COs may actively frustrate criminal prosecution of terrorism suspects. Once a suspect is under a CO, they will often adjust their behaviour and activities accordingly, thereby preventing law enforcement from obtaining the evidence necessary for a prosecution.[21]

***Recommendation 2: Liberty Victoria recommends that the regime for Control Orders in Division 104 of Part 5.3 of the Criminal Code should be repealed in its entirety.***

50. This recommendation is consistent with other, independent analyses of the CO regime:
    a. In 2012, the INSLM found that COs are 'not effective, not appropriate and not necessary',[22] and recommended that Division 104 be repealed.[23]

[17] INSLM, 2012 Report, 44.
[18] INSLM, 2012, 37.
[19] INSLM, 2012 Report, 37-8.
[20] Quoted in INSLM, 2012 Report, 26-7.
[21] INSLM, 2012 Report, 27-8.
[22] INSLM, 2012 Report, 8-9.
[23] INSLM, 2012 Report, 44.

b. In 2014, the Parliamentary Joint Committee on Human Rights concluded that the CO regime is likely to be incompatible with human rights.[24]

Preventive Detention Orders

**What are Preventive Detention Orders?**

51. Division 105 of Part 5.3 of the Criminal Code provides for the making of Preventive Detention Orders (**PDOs**).
52. Under a PDO, police may detain a person (the **subject**) who is 16 years or over for up to 48 hours.
53. There are two types of PDO:
    a. an initial PDO for up to 24 hours, which may be issued by senior members of the AFP; and
    b. a continued PDO for up to 48 hours from when the person was first detained, which may be issued by judges, magistrates, tribunal members or retired judges acting in their personal capacity.
54. In general, a PDO may be made where:
    a. the making of the order would substantially assist in preventing a terrorist act that could occur within the next 14 days, or would preserve evidence of a terrorist act that has occurred within the last 28 days; and
    b. the order is reasonably necessary for that purpose.

**Problems with PDOs**

*Incompatible with personal liberty*

55. In a liberal democracy, it is axiomatic that the government may only detain a person in custody following a finding of criminal guilt for past conduct in a fair trial. Justice Gummow noted in *Fardon v Attorney-General (Qld)* that:

> [T]he "exceptional cases" aside [such as detention on the grounds of mental illness or infectious disease], the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts … [and] follows from a trial for past, not anticipated, conduct.[25]

56. This principle is subject to limited exceptions, such as temporary detention of a person with a mental illness who poses a risk of harm to themselves or others.[26] To be justified, however, executive detention must be necessary to achieve an important public purpose, tailored to achieve that purpose and subject to safeguards against abuse. As Justice

[24] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourteenth Report of the 44th Parliament* (2014) 17.

[25] (2004) 223 CLR 575, [80].

[26] See, eg, the making of treatment orders under the *Mental Health Act 2014* (Vic).

Stevens of the United States Supreme Court explained in *Rumsfeld v Padilla*, a case also involving executive detention of terrorism suspects:

> At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.[27]

57. The PDO regime permits the executive to detain a person (including a child over the age of 16) in custody for up to 48 hours, in the absence of any charge or conviction of a criminal offence, on the basis of what law enforcement agencies suspect they may do in the future. This is a radical intrusion on personal liberty. Liberty Victoria is opposed to PDOs in principle on this basis. Moreover, as the remainder of this submission aims to illustrate, this intrusion is not necessary to achieve any pressing public purpose.

*Inadequate safeguards*

58. The PDO regime suffers from some of the same procedural issues identified above at paragraphs 0 to 38 in relation to COs. As Rebecca Ananian-Welsh notes:

> PDOs are issued in proceedings divorced entirely from fair or ordinary judicial process. The proceedings are not open. The decision is reached on the basis of information not governed by the rules of evidence. The only information the Issuing Authority sees from the detainee is provided through the detaining officer. The Issuing Authority does not hear directly from the detainee, nor is the detainee in a position to hear the case against him or her, or to challenge the matter before the Issuing Authority. The detainee's right of appeal is limited to merits review in the Administrative Appeals Tribunal only once the order is no longer in force. Full reasons are not given for the Issuing Authority's decision.[28]

59. In particular, Liberty Victoria draws attention to the following alarming elements of the PDO regime:[29]

    a. Limited communication: a PDO seriously circumscribes the subject's freedom of communication. The subject is not allowed to contact people outside a small group of exceptions (such as one family member).[30] Even when contacting a person in this group, the subject cannot disclose the fact that

[27] Quoted in *Al-Kateb v Godwin* (2004) 219 CLR 562, [157] (Kirby J).
[28] Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38(2) *University of New South Wales Law Journal* 756, 785.
[29] For further information, see Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights' (2007) 31 *Melbourne University Law Review* 1072, 1077-9; Svetlana Tyulkina and George Williams, 'Preventative Detention Orders' (2015) 38(2) *University of New South Wales Law Journal* 738, 745-8.
[30] Criminal Code 105.34.

they are being detained or the period for which they are to be detained.[31] The subject may contact a lawyer, but all communication must be monitored by a police officer.[32] This destroys lawyer-client confidentiality.

b. Limited disclosure: the Criminal Code creates a range of offences for disclosing information about a PDO, punishable by up to five years' imprisonment, which apply even to the subject and their lawyer.[33] This destroys the prospect of any real political accountability for the use of PDOs.

c. Limited rights of review: there is limited scope for meaningful review of a PDO. The subject may apply to the Commonwealth Administrative Appeals Tribunal for merits review of the order, but not while it is in force.[34] The subject cannot apply for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[35] These provisions weaken legal accountability for the use of PDOs.

d. May be issued without independent scrutiny: a senior member of the AFP may issue an initial PDO, which authorises detention for up to 24 hours.[36] A person can thus be detained under the PDO regime without any independent determination of whether the detention is warranted or lawful in the circumstances.

*Unnecessary*

60. For essentially the same reasons as discussed above at paragraphs 0 to 46 in relation to COs, PDOs are unnecessary. The conventional powers of arrest and detention that accompany ordinary criminal procedures – charge, prosecution, and conviction (or acquittal) – are entirely adequate to address the threat posed by people engaged in terrorist activity.

61. After reviewing the PDO regime in 2012, the INSLM concluded that:

> There is no demonstrated necessity for these extraordinary powers, particularly in light of the ability to arrest, charge and prosecute people suspected of involvement in terrorism. No concrete and practical examples of when a PDO would be necessary to protect the public from a terrorist act because police could not meet the threshold to arrest, charge and remand a person for a terrorism offence have been provided or imagined.
>
> Police should instead rely on their established powers to take action against suspected

[31] Criminal Code s 105.35(2).
[32] Criminal Code 105.38.
[33] Criminal Code s 105.41.
[34] Criminal Code s 105.51(5).
[35] Criminal Code s 105.51(4).
[36] Criminal Code s 100.1(1).

> criminals through the arrest, charge, prosecution and lengthy incarceration of suspected terrorists. This traditional law enforcement approach operates in accordance with fair trial and due process rights and is undoubtedly more effective as a preventive tool. The best possible outcome from a policing perspective is to prosecute individuals involved in terrorism. The prosecution, conviction and incarceration of such people will protect the public for a far greater period of time, with lengthy incarceration unquestionably more effective as a preventive strategy than detention for a maximum of 2 days under a PDO (or 14 days under a State or Territory PDO).[37]

62. This is reinforced by the fact that many law enforcement agencies have expressed a reluctance to use the PDO regime, preferring instead to stick to more conventional powers. In the Council of Australian Governments' review of counter-terrorism legislation, three States (Victoria, South Australia and Western Australia) submitted that they would be unlikely to use the PDO regime at all, as it was unwieldy and overly complex in comparison to other, readily available and more traditional policing methods and powers.[38]

*Unprecedented*

63. From an international perspective, Australia's PDO regime is unprecedented and exceptional. After a review of other jurisdictions, Svetlana Tyulkina and George Williams concluded that '[t]here are simply no other examples of a power of preventative detention without arrest or charge similar to Australian PDOs'.[39] It is difficult to see how a regime with no international comparator is necessary for the security of Australian society.

*Rarely used*

64. PDOs are very rarely used. The PDO regime has only been used four times since its enactment in 2005, and was not used at all in the first nine years. This reinforces Liberty Victoria's view that PDOs are not necessary to address the threat posed by a person who plans to engage in terrorist conduct.

*Constitutionally suspect*

65. Finally, detention under a PDO is constitutionally suspect. Under the *Commonwealth Constitution*, the punitive detention of a person in custody is a function reserved to the judiciary. Legislation that purports to authorise the Commonwealth executive to detain

[37] INSLM, 2012 Report, 67.
[38] Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 69-70. See also INSLM, 2012 Report, 51-2.
[39] Svetlana Tyulkina and George Williams, 'Preventative Detention Orders' (2015) 38(2) *University of New South Wales Law Journal* 738, 744.

a person for a punitive purpose, other than following a judicial finding of criminal guilt, will be invalid as contrary to the constitutional separation of powers.[40]

66. The High Court has recognised that the executive may detain persons for non-punitive purposes consistently with the *Commonwealth Constitution*. However, there is a substantial risk that the PDO regime is unconstitutional:

    a. Detention for up to 48 hours is arguably punitive, irrespective of the government's purported justifications for the detention. In *North Australian Aboriginal Justice Agency Limited v Northern Territory*, the High Court considered a police power to arrest and detain a person for up to four hours. Chief Justice French and Justices Kiefel and Bell found that detention under this power was administrative, rather than punitive, but contemplated that a power to detain for a 'significantly greater' period might become punitive.[41]

    b. The PDO regime involves serving federal judges in the proceedings that lead to the issuing a PDO, which lack fundamental features of due process. The PDO regime may thus be unconstitutional as incompatible with the judges' performance of their judicial functions.[42]

***Recommendation 3: Liberty Victoria recommends that the regime for Preventive Detention Orders in Division 105 of Part 5.3 of the Criminal Code should be repealed in its entirety.***

67. This recommendation is consistent with other, independent analyses of the PDO regime:

    a. In 2012, the INSLM found that '[i]ts essential elements are at odds with our normal approach to even the most reprehensible crimes' and concluded that '[t]here is no demonstrated necessary for these extraordinary powers'.[43] He recommended that Division 105 be repealed.[44]

    b. In 2013, the Council of Australian Governments stated that the PDO regime was 'neither effective nor necessary' and recommended (by majority) that it should be repealed.[45]

    c. In 2014, the Parliamentary Joint Committee on Human Rights concluded that the PDO regime is likely to be incompatible with human rights.[46]

---

[40] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).
[41] *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, [38].
[42] Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38(2) *University of New South Wales Law Journal* 756.
[43] INSLM, 2012 Report, 67.
[44] INSLM, 2012 Report, 67.
[45] Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 70-1.
[46] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fourteenth Report of the 44th Parliament* (2014) 22.

Thank you for the opportunity to make this submission. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Jessie Taylor, Liberty Victoria Senior Vice President, Michael Stanton, or the Liberty office on 03 9670 6422 or info@libertyvictoria.org.au. This is a public submission and is not confidential.

Jessie Taylor
President, Liberty Victoria

Michael Stanton
Senior Vice-President, Liberty Victoria